DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 01-0276
Indiana Use Tax
For the Tax Years 1998, 1999, and 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Assessment of Use Tax on Bid Documents Acquired on Behalf of Taxpayer's Customers.

Authority: 45 IAC 2.2-4-2.

Taxpayer protests the imposition of use tax against its purchases of bid documents which are acquired on behalf of the tax-exempt customers of its architectural services.

II. Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Alternatively, taxpayer has requested that the Department exercise its discretion to abate the ten-percent negligence penalty on the ground that its failure to self-assess use tax was an honest mistake and that the acquisition and transfer of the documents on behalf of its clients did not result in a profit to the taxpayer.

STATEMENT OF FACTS

Taxpayer is an architectural firm conducting the majority of its business – approximately 75% – on behalf of various tax-exempt organizations such as schools. After taxpayer has completed the design and specification work for one of its customers, taxpayer works with the customer and the associated contractors to assure that the construction project is successfully completed. As part of that post-design process, taxpayer arranges with a printing company to prepare "bid documents" for the project. The "bid documents" consist of blueprints and project specifications. Typically, the printing company will prepare approximately 60 sets of these bid documents. The bid documents are then made available to companies which intend to place a bid on the construction project. These bidding companies leave a deposit with taxpayer to assure the return of the documents. After the contract has been awarded to the successful bidder, the successful bidder is entitled to make use of the blueprints and project specifications which have been returned by the unsuccessful bidders.

The printing company bills taxpayer for the bid documents. Taxpayer pays the printing company directly and then turns to the customer for reimbursement of that amount. Taxpayer does not mark up the cost of the bid documents. If taxpayer pays the printing company $1,000 for a

particular project's bid documents, taxpayer seeks $1,000 reimbursement from the customer. According to taxpayer, this procedure is followed in order to assure that the printing company is promptly paid for the bid documents.

The audit determined that the taxpayer should have paid Indiana sales or use tax on the bid documents. Taxpayer protested that determination, an administrative hearing was held, and this Letter of Findings follows.

DISCUSSION

I. Assessment of Use Tax on Bid Documents Acquired on Behalf of Taxpayer's Customers.

The preparation and provision of the bid documents is a necessary incident to the architectural services taxpayer provides for its customers. Under 45 IAC 2.2-4-2, taxpayer does not collect sales tax for the cost of the services it provides to its customers. However, that regulation also requires that taxpayer pay the gross retail (use) tax on the cost of the bid documents which are acquired for, and transferred on behalf of, the ultimate customer. In part, the regulation states as follows:

> Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
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> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
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> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
>
> (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; *and*
>
> (4) The serviceman pays gross retail tax or use tax upon the tangible personal property upon the tangible personal property at the time of acquisition. (*Emphasis added*).

Taxpayer erroneously assumed that its customers' tax-exempt status carried over to the transactions between itself and the printing company. Taxpayer assumed it was exempt from paying sales tax or self-assessing use tax on the cost of acquiring the bid documents from the printing company. Nonetheless, liability for the gross retail tax accrued as a result of the transaction between taxpayer and the printing company. Taxpayer's customers stood outside that transaction rendering the customers' own tax-exempt status entirely irrelevant. Therefore, in the transactions between taxpayer and the printing company, either the printing company should have collected sales tax or the taxpayer should have self-assessed use tax. In the absence of any indication that the printing company collected the sales tax, taxpayer remains entirely liable for self-assessing the use tax.

Since the audit, taxpayer has adjusted the business arrangements between itself, its customers, and the printing company such that taxpayer presumably avoids accruing further use tax liability. With that in mind, taxpayer requests that that the Department abate the existing use tax liability – together with the accumulated interest charges – on equitable grounds. Taxpayer asserts that it never profited on the amount of reimbursement it received from its customers. According to taxpayer, it reasonably believed that it was entitled to assert its customers' tax-exempt status for the transactions it entered into with the printing company. Taxpayer further asserts that, subsequent to the audit, it has made a reasonable and good faith effort to arrange its business practices to wholly comply with the "technicalities" of the state's gross retail tax.

However well intentioned taxpayer's efforts – either before or after the audit – may have been, the Department is completely without authority to make an "equitable" adjustment of taxpayer's use tax assessment. There is nothing within the Indiana statutes or the Department's regulations which provides the Department authority to make an adjustment of a properly levied tax assessment or the interest which has accrued against that assessment. It would be both presumptuous and extra-legal for the Department to grant taxpayer's request.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten-Percent Negligence Penalty.

The audit assessed the ten-percent negligence penalty against taxpayer. The taxpayer protests imposition of that penalty assessment. IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent.

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

Taxpayer's assertion that it was previously unaware of its responsibility to pay sales tax or to self-assess use tax upon acquisition of the bid documents, does not justify abatement of the ten-percent negligence penalty. As plainly set out in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

FINDING

Taxpayer's protest is respectfully denied.